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Nos. 94-311 and 94-312

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FOSTER WHEELER CORPORATION,
Petitioner,
v.
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Respondent.

FOSTER WHEELER ENERGY CORPORATION,
Petitioner,
v.
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Laborers' International Union of North America, AFL-CIO ("Union" or "Laborers" hereinafter), hereby files this Opposition to both the petition for a writ of certiorari filed by the Foster Wheeler Corporation in No. 94-311 and to the petition for a writ of certiorari

filed by the Foster Wheeler Energy Corporation in No. 94-312.

CITATION OF OPINIONS BELOW

Since the petitions for certiorari were filed, the opinion of the United States Court of Appeals for the Third Circuit as to which certiorari is sought has been reported at *Laborers' International Union of North America, AFL-CIO v. Foster Wheeler Corp.*, 26 F.3d 375 (1994).

STATEMENT OF THE CASE

The Petitioners, thrice found guilty of grossly employing deceit as a matter of corporate policy, now come to this Court pretending to innocence. This misconduct was directly relevant to the result below and makes this case unique, and not of general significance. This case is also not worthy of review because the principal legal issue raised will not recur; such overarching abstract theoretical issues as lurk in the background are obscured by the Petitioners' pervasive misconduct.

The fact of Foster Wheeler's fraud was found by an arbitrator [1] and confirmed by both courts below. 26 F.3d at 379 n.2 (App. 9a & n.2).[2] Yet, Petitioners provide no hint of these findings in their pending petitions. Instead, they set out the facts as if a neutral in this matter, the non-union Energy Plant Constructors ("EPC" hereinafter), not the employer, Foster Wheeler Energy Cor-

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[1] FWC incorrectly asserts that the arbitrator's "award was vacated in its entirety in *Laborers' Int'l Union v. Foster Wheeler Corp.*, 868 F.2d 573 (3d Cir. 1989)." (FWC Pet. at 8.) The Third Circuit specifically ruled in its most recent opinion that it had *not* vacated the entire award in its 1989 decision and that the arbitrator's findings on several key issues are now the law of this case. 26 F.3d at 396-99 (App. 53a-62a). The validity of this ruling is not raised in the petitions.

[2] The latest opinion of the Third Circuit will be cited as in the official reporter with parallel references to the identical appendices filed by the petitioners.

poration ("FWEC" hereinafter), which was under contract with the Union, had been the *de facto* prime contractor on the project. (FWEC Pet. at 4; FWC Pet. at 5-6.)

It is therefore necessary to supplement Petitioners' statements of the case with an account of their misconduct, as found by the arbitrator and the courts below.

FWC's and FWEC's Bad Faith Conduct

Ultimately in dispute is whether a collective bargaining agreement, the "National Agreement," between Petitioner FWEC and the Laborers applied to the construction of a sour gas treatment and sulfur recovery facility built for Mobil Oil Exploration & Producing Southeast, Inc. ("MOEPSI" hereinafter) at a site on Mobile Bay, Alabama.

Foster Wheeler and the Laborers had been parties to a series of National Agreements for many years. These agreements covered constructon in all but three of the states and required signatory employers to hire construction laborers through hiring halls established by the Laborers' local union in whose area a particular project was to be performed. In this case, the MOEPSI project was in territory covered by Laborers Local 70 located in Mobile, Alabama. The National Agreement also obligated employers to limit the subcontracting of covered work to subcontractors which were also signatories with the Union. 26 F.3d at 379 (App. 8a).

In the early 1980's, MOEPSI began evaluating contractors for a gas treatment facility to be built near Mobile, Alabama. *Id.* FWEC was interested in being considered for this work, which was of the type covered by the National Agreement. FWEC believed that its chances of winning the contract would be improved if it could offer to do the work on a non-union basis. *Id.* at 380 n.2 (App. 10a n.2). To resolve this dilemma, FWEC

decided to engage in a fraud on the Union by bidding for the work under the name of a non-union nominee. The nominee would then be free to subcontract the engineering work (work not covered by the National Agreement) back to FWEC while performing or subcontracting the construction work on a non-union basis. *Id.*

FWEC first proposed to use its sister corporation, Foster Wheeler Intercontinental Corporation ("FWIC"), as its front. FWIC's operations were strictly in foreign countries; it had no employees in the United States and was not a signatory to any union agreement. *Id.* To carry out the plan, FWEC officials directed its employees to use the FWIC name and letterhead when communicating with third parties about the project. FWEC personnel consistently misidentified themselves as FWIC employees in the bid documents for the MOEPSI project that FWEC prepared in early 1984. *Id.* In 1984, MOEPSI was on the verge of officially awarding its project to FWIC when it was discovered that FWIC lacked the requisite license to become even the nominal prime contractor. FWEC then nominated another of its sister companies, the non-union construction company Energy Plant Constructors, to serve as prime contractor. *Id.* at 380 n.2 (App. 11a n.2).

MOEPSI awarded the project to EPC only after receiving a side letter from FWC in which the parent company guaranteed the work. Although, on paper, EPC had sole contractual authority to manage the project, project management was actually performed by FWEC employees. *Id.* EPC "subcontracted" the engineering work to FWEC and retained the construction work. *Id.* As a result of these arrangements, EPC had sole authority to perform the construction work, some of which it did with its own non-union work force, some of which it subcontracted to other non-union contractors. *Id.* at 381 (App. 12a-13a). No laborers on this project were hired through Laborers Local 70.

The use of FWIC, and later EPC, as the purported prime contractor had no rationale other than as a device to deceive the Union. FWEC admitted at trial that its use of FWIC's name was a matter of "semantics" and that the only difference resulting from FWIC's and EPC's nominal status was whether a union contractor or a non-union contractor like EPC performed the construction work. (District Court trial opinion, App. 242a.)

Thus, the record amply supports the trial court's finding that "the defendants worked to conceal the ample evidence of FWEC's extensive involvement in the bidding process and in MOEPSI's project management . . . [and] actively deceived [the Laborers] about the [National Agreement's] applicability," (App. 275a), and that Petitioners did so "for a long time," (App. 269a), and the Court of Appeals' finding that Foster Wheeler's arrangement "was suffused with subterfuge." 26 F.3d at 379 (App. 9a).

The Evolving Legal Standards

Since 1959, section 8(f) of the National Labor Relations Act has permitted a union and an employer in the construction industry to enter into a collective bargaining agreement prior to the commencement of construction on a particular project and, *a fortiori*, prior to the point at which the union attained majority employee support. 29 U.S.C. § 158(f). The difference between this rule and that governing other industries has led to a distinct body of law which has found its way to this court on several occasions. *E.g., Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983); *NLRB v. Local 103, Int'l Ass'n of Iron Workers (Higdon Constr. Co.)*, 434 U.S. 335 (1978). The National Labor Relations Board's position has evolved over time with its latest attempt at comprehensive regulation coming in 1987 in *Deklewa*.[3]

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[3] *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987), *enforced sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert. denied*, 488 U.S. 889 (1988). Hereinafter, the Board

While the MOEPSI project was under construction in 1985-86, federal labor law permitted contractors in the construction industry to repudiate their collective bargaining agreements at will, without regard to the term of the agreement, so long as the union had not yet attained majority support among employees. *R.J. Smith Construction Co.*, 191 NLRB 693, 695 & n.5 (1971), *enforcement denied sub nom, Local 150, International Union of Operating Engineers v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973); *Ruttman Construction Co.*, 191 NLRB 701, 702 (1971). Had FWEC repudiated its National Agreement in 1984, it could have openly pursued the MOEPSI project on a non-union basis in its own name. However, FWEC took no steps to repudiate the Agreement at that time and denied, as late as letters of July 11, August 2 and August 9, 1985, that it was repudiating the agreement through its conduct. *Id.* at 381 (App. 14a-15a).

FWEC decided against repudiation of the National Agreement for good reason: it wanted to retain the substantial benefits the agreement provided elsewhere. In exchange for its promise to apply the National Agreement throughout the United States, even in areas like Alabama where the local unions were weak and the jobs could otherwise be done non-union, FWEC gained the right to use the agreement in strong union areas. Before, during, and after the MOEPSI project, FWEC was performing other construction projects under the National Agreement and similar agreements with the Laborers in such strong union areas as California and Illinois. By cheating on its contractual obligations for at least a year and a half, FWEC could have its cake in these strong union areas and eat it in Alabama. *Id.* at 393-94 (App. 47a-48a).

In August 1985, FWEC adopted an alternative position —that it was repudiating the agreement only as to the

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decision will be cited as *Deklewa* and the Third Circuit's enforcement of that decision as *Iron Workers Local 8*.

MOEPSI project. FWEC based its "single-site" repudiation of the National Agreement on the July 1985 decision in *Painters Locan Union No. 164 v. Epley*, 764 F.2d 1509 (11th Cir.), *cert. denied*, 475 U.S. 1120 (1986), the first case which arguably permitted such limited repudiation.[4] *Id.* at 394 and n.19 (App. 48a and n.19). However, by the time FWEC purported to rely on *Epley*, such reliance was no longer detrimental—or even significant—because FWEC had long since contracted away its ability to comply with the National Agreement. *Id.* at 394 (App. 48a-49a). FWEC had already committed to MOEPSI that it would use EPC as a non-union construction subcontractor, EPC had already been awarded the contract, and EPC had already contracted with myriad non-union sub-contractors. FWEC had placed itself in this position when it pursued its scheme of setting up FWIC and then EPC as the nominal prime contractor and failed to impose on EPC and its subcontractors the contractual obligations necessary to meet FWEC's obligations under the National Agreement. *Id.* at 381-82 (App. 15a).[5]

The Laborers filed a grievance contending that the National Agreement applied to the project because FWC, EPC and FWEC were commonly controlled and therefore a single or joint employer[6] and because FWC, the

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[4] The District Court noted its agreement with the Union that *Epley* was a faulty interpretation of pre-*Deklewa* law as applied to multi-state collective bargaining agreements, such as the National Agreement here, because it destroyed the *quid pro quo* on which such agreements are founded. (App. 266a n.42).

[5] FWEC complains that there was no evidence to support the Third Circuit's finding that FWEC was unable to comply with the National Agreement in August 1985. (FWEC Pet. at 17.) However, the relevant agreements—both FWEC's/EPC's representations to MOEPSI that the job would be performed non-union and its subcontracts to non-union subcontractors—are in the record, as well as the direct testimonial admissions of company agents.

[6] *Cf. South Prairie Construction Co. v. Operating Engineers*, 425 U.S. 800, 802-03 & n.3 (1976) (*per curiam*) (interrelated opera-

parent of both FWEC and EPC, was FWEC's alter ego. On these premises, the Union argued that FWC and FWEC were bound under the terms of the National Agreement to apply the agreement to the MOEPSI project.[7]

The exposure of the employer subterfuge outlined above transformed the theoretical underpinnings of the Union's grievance. No longer did the Union need to prove that EPC, FWEC, and FWC were all a joint or single employer. As informed by the discovery of FWEC's actual role, the Union modified its contention to claim that FWEC was the prime contractor and that, therefore, the National Agreement applied directly to the MOEPSI project. For this reason, it became irrelevant whether EPC, FWC and FWEC were joint employers. Indeed, after the discovery of FWEC's actual status as the prime contractor—and the lengths to which it had gone to hide that role from the Union—it became irrelevant that the non-union contractor chosen as a front was the wholly-owned FWC subsidiary, EPC. FWEC's contractual liability would have been the same had it chosen an unrelated non-union construction company; it was still legally bound to have followed its collective bargaining agreement on its MOEPSI project.

When FWC and FWEC refused to arbitrate the grievance, the Laborers brought this action. The tortured procedural history of this case is adequately set forth in the petitions and in the opinion of the Third Circuit.

In 1987, the NLRB renounced its anomalous treatment of prehire collective bargaining agreements in the

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tions, common management and ownership, and central control of labor relations support single employer finding).

[7] While FWC eventually conceded after five years of litigation that it was FWEC's alter ego, that issue had lost its significance. Once the arbitrator found and the District Court confirmed that FWEC, the signatory to the National Agreement, was the *de facto* prime contractor on the project and had a direct obligation to apply the agreement, FWC's obligations became superfluous.

construction industry and decided, in *Deklewa*, that during their term such agreements ought to be treated like other labor contracts, without being subject to repudiation at the will of either party. Moreover, the Board held that its new rules for the interpretation of these agreements would be applied retroactively. The Third Circuit enforced the Board's order and expressly approved the Board's decision to apply *Deklewa* retroactively. *Iron Workers, Local 3*, 843 F.2d at 781.

In its decision below, the Court of Appeals decided that the *Deklewa* principles must also be applied retroactively in this case. The court reasoned, in part, that Foster Wheeler had not relied on a pre-*Deklewa* right of repudiation in any meaningful way. 26 F.3d at 395 (App. 50a-51a). The court found that Foster Wheeler had instead relied on its scheme of deceit, and that it "relied" on a purported right of repudiation only long after it had given up the right to require compliance with the National Agreement. *Id.* In other words, the court found that, even if Foster Wheeler had known in 1985 that the *Deklewa* principles would be applied and it could no longer repudiate its agreement with the Laborers at will, it had woven such a tangled web to deceive the union that it could no longer have extricated itself from the conundrum of its own making. *Id.*

In this context and in light of prior holdings that the retroactive application of the *Deklewa* principles would promote the interests of the NLRA, the Court of Appeals found no reason to depart from "the norm" of retroactive application of new rules of law. *Id.* at 394-95 (App. 49a-51a).

REASONS AGAINST GRANTING THE PETITIONS

I. THE QUESTION WHETHER *DEKLEWA* SHOULD BE RETROACTIVELY APPLIED WILL NEVER RECUR.

a. Both Petitioners posit as their first question for review the principal issue in the court below: whether *Deklewa* should be applied retroactively to the present case, which arises on facts transpiring before that decision. This issue is not worthy of review because, as found by the Third Circuit, it "will probably never recur." 26 F.3d at 378, & n.1 (App. 4a & n.1). The accuracy of this judgment is hard to question: the NLRB's decision is now seven years old. Counsel is unaware of any pending litigation either in court or in any administrative agency involving a pre-*Deklewa* contract repudiation. Issues which are not susceptible of repetition are unworthy of review in this Court. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

b. Moreover, the particular formulations of the *Deklewa* retroactivity questions presented by Petitioners lead up side jurisprudential alleys of marginal interest. As framed by FWEC, the Court of Appeals chose a five-factored test "to determine whether *Deklewa* should apply retroactively" but erred "by its clear misapplication of [that] test to the facts." FWEC Pet. at 15. Petitioner proceeds to argue point by point for its view of the proper application of each of the five factors. *Id.* at 15-23.

The application of a test to the facts of a case, as opposed to the choice or establishment of the test, only very rarely involves an important question of federal law warranting a writ of certiorari. This is not one of those exceptions. The facts of this case, as outlined above, are unique and the application of the five-factored test in this case is unlikely to be controlling elsewhere.

c. FWC makes a different point. FWC claims the appellate court's error to have been its failure to apply

a single-factor litmus test. Other courts of appeal have universally limited the retroactive application of *Deklewa*, asserts FWC, to cases in which the union had achieved majority status. (FWC Pet. at 13-16.)[8]

FWC's contention that there exists a conflict among the circuits over *Deklewa*'s retroactivity mistakes differing results with a true conflict of decisions. Neither the court below nor the other circuit courts which have ruled on *Deklewa*'s retroactivity sought to issue a definitive ruling which would apply in all circumstances, but instead limited their consideration to the facts before them. Accordingly, the Third Circuit did not consider its decision below to be in conflict with the decisions of the other circuits.

> Moreover, the fact that some recurring circumstances have been identified as rendering retrospective application of the *Deklewa* rule manifestly unjust does not dictate a similar result in other cases presenting a dissimilar coincidence of circumstances.

Id. at 391 (App. 39a).

The factual dissimilarities are readily apparent. None of the circuits which denied retroactive application of *Deklewa* involved the purposeful subterfuge engaged in by Foster Wheeler here. The pursuit of this subterfuge led Foster Wheeler to eschew reliance on its pre-*Deklewa* right of repudiation until it had become meaningless. *Id.* at 382, 393-94. This unique set of circumstances led the court to find that the "defendants had not in fact relied to their detriment upon the discarded rule, a factor of primary importance," and that this factor tipped the balance "strongly . . . in favor of retrospective application of the *Deklewa* rule to this case." *Id.* at 395.[9]

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[8] This test could only be applied to the issue of *Deklewa*'s retroactivity and therefore is an extremely limited question.

[9] This case also presents unique facts under pre-*Deklewa* law. The Laborers' argued in the courts below that, even under pre-*Deklewa* law, Foster Wheeler's purported repudiation would have been ineffective. The well-settled contract doctrine of "prevention"

Circuits deciding against retroactivity have similarly relied on the distinct facts before them. *C.E.K. Industrial Mechanical Contractors Inc. v. NLRB*, 921 F.2d 350 (1st Cir. 1990) ("we find that this dispute is one in which manifest injustice would result from retroactive application of *Deklewa*); *United Bhd. of Carpenters, Local Union 953 v. Mar-Len of Louisiana, Inc.*, 906 F.2d 200, 203 (5th Cir. 1990) ("*Deklewa* cannot be applied retroactively in this case"); *Mesa Verde Construction v. Northern Cal. District Council of Laborers*, 895 F.2d 516, 519 (9th Cir.) *cert. denied*, 498 U.S. 478 (1990) ("retroactive application in this context" would be unjust). For example, in *C.E.K. Industrial*, the First Circuit denied retroactivity, in part relying on the fact that the employer had acted in a forthright manner with the Union. The Court found that the employer did not "attempt to take advantage of the benefits of a prehire agreement," but had "put the union on notice, well before the commencement of the alleged unfair labor practice, that he repudiated any agreement. . . ." 921 F.2d at 358-59.

Thus, the difference in the result of this case and those of the circuits deciding against the retroactivity of *Deklewa* is adequately explained by the different facts presented.

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holds that a party to a contract, who has wrongfully prevented the other party from fulfilling (or "substantially contributed to the non-occurrence" of) a condition precedent to the first party's obligations, is deemed to have waived the condition, and full performance of the contract is required. *Shear v. National Rifle Ass'n of America*, 606 F.2d 1251, 1254-55 (D.C. Cir. 1979); *NLRB v. Local 554, Graphic Communications Int'l Union*, 991 F.2d 1302 (7th Cir. 1993). *See generally, Restatement (Second) of Contracts*, § 269 (1973). This doctrine applies to prevent Foster Wheeler from relying on the Laborers' lack of majority support as a condition precedent to full enforceability of the prehire agreement, because Foster Wheeler's deceit substantially contributed to the Laborers' inability to achieve majority support among the relevant employees. The Court of Appeals did not reach this issue. 26 F.3d at 395 n.21.

d. The petitioners attempt to manufacture a conflict by arguing that the retroactivity *standard* applied by the Third Circuit is radically different than that employed by other courts. Some circuit courts considering *Deklewa*'s retroactivity, like the Third, have expressly applied the "manifest injustice" retroactivity test of *SEC v. Chenery*, 332 U.S. 194 (1947), which has been used to evaluate the retroactivity of agency adjudications. Others have applied the test set out in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), traditionally applied to test the retroactivity of court decisions. In practice, however, each circuit court facing the issue of *Deklewa*'s retroactivity for the first time, has looked to the same basic factors: the reasonableness and degree of the party's reliance on the prior law, the degree of injury, and the extent to which retroactive application serves the statutory interests. *NLRB v. Viola Industries*, 979 F.2d 1384, 1396-97 (10th Cir. 1992); *NLRB v. Bufco Corp.*, 899 F.2d 608, 612 (7th Cir. 1990); *Iron Workers, Local 3*, 843 F.2d at 781; *Fox Painting Co. v. NLRB*, 919 F.2d 53, 56 (6th Cir. 1990); *C.E.K. Industrial, supra; Mar-Len, supra*; and *Mesa Verde Construction, supra.*

Similarly, the choice of standard would not have made a difference in this case, as acknowledged by the Court of Appeals. 26 F.3d at 389 n.10 (in light of *Iron Workers, Local 3*, it is "doubtful" that use of the *Chevron* standard would have produced a different result).

Thus, despite differing labels and formulations, there is little substantive difference between the standard employed by the Third Circuit here and that used by the other circuit courts.

II. CERTIORARI IS NOT WARRANTED ON THE ABSTRACT QUESTION OF THE APPROPRIATE STANDARD TO GOVERN THE RETROACTIVITY OF DECISIONS OF ADMINISTRATIVE AGENCIES.

Attempting to frame an issue of broader application than retroactivity solely as it applies to the *Deklewa* decision, this Court, FWEC asserts, needs to finish the

job of determining whether adjudicated decisions should be retroactively applied. The Court commenced this task, says FWEC, in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), and *Harper v. Virginia Department of Taxation*, 113 S.Ct. 2510 (1993), where it considered the retroactivity of judicial adjudications. But the Court has not addressed the same question with respect to administrative adjudications, leading the courts of appeal to apply a variety of separate and inconsistent tests, according to FWEC. FWEC Pet. at 12-14.

The rebuttal to Petitioner's claim is twofold: the courts of appeal have not developed a clearly articulated split and, had they, these parties are plainly inappropriate to present such an issue to this Court.

a. Consideration whether a split exists starts from the pair of decisions in this Court which might have given rise to such a conflict. In *James B. Beam* and *Harper* this Court held that selective prospectivity in the application of the decisions of this Court violated the Constitution. (App. 27a.) The Third Circuit found that this Constitutional principle did not necessarily extend to agency adjudications, however. (App. 27a-33a n.8.[10]) Instead, reasoned the Third Circuit, the retroactivity of agency determinations is to be determined on a case-by-case analysis under the "manifest injustice" analysis of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). (App. 33a-36a & n.10.)

But the appellate decisions cited by FWEC as articulating a split in the circuits do not, in fact, even consider either the question whether *Beam* and *Harper* apply to agency decisions or the issue whether the *Chevron* and *Chenery* standards differ on this score. (FWEC Pet. at 13-14.) This is not surprising since, with the exception of the decision below, all of the circuit decisions

[10] It further ruled, however, that because it reached the same result even under its alternative standard, "we need not definitively decide this question." *Id.* at 32a n.8.

cited predate *Beam* and *Harper*. Indeed, before the issuance of *Harper* and *Beam*, even the Third Circuit believed that there was no substantive difference between the retroactivity analysis for judicial determinations under *Chevron* and for agency determinations under *Chenery*. *Iron Workers Local 3*, 843 F.2d at 780 n.12. A clearly articulated split among the circuits worthy of this Court's review must await further consideration of the application of *Beam* and *Harper* to agency decisions, a consideration which may be provoked by Judge Becker's opinion in this case.

Moreover, the current case is inappropriate for considering the retroactivity of agency decisions because it does not even arise from an agency determination. The current case involves instead a decision by the federal judiciary arising under Section 301 of the Labor Management Relations Act. 29 U.S.C. § 185. It puts the cart before the horse to ask this Court to entertain the question whether an agency decision should be retroactively applied in a federal contract action even before it considers whether the decision should be retroactively applied by the agency in other agency cases. Still worse, the Union's position below was not that *Beam* and *Harper* required the retroactive application of the National Labor Relations Board's determination in *Deklewa*. Rather, the Union was seeking the retroactive application of the Third Circuit's decision in *Iron Workers Local 3*, which enforced *Deklewa*, based upon the Third Circuit's independent considerations of the *Chevron* and *Chenery* standards there. 843 F.2d at 780 n.12. Whatever the merits of this argument, it substantially muddies the analysis of the proper standard to evaluate retroactivity of agency decisions, rendering this case an inappropriate vehicle for consideration of that issue.

b. Moreover, the current parties are unlikely to be zealous advocates in this debate because no one is prepared to espouse either of the principal positions: that *Beam* and *Harper* apply to agency decisions as well as court decisions or, alternatively, that *Chenery* requires a

different result. Judge Becker rejected the claim that *Beam* and *Harper* require that agency decisions be retroactively applied as a matter of law, holding instead that a *Chenery*/choice-of-law analysis applied.

Petitioners reject both of these principal alternatives on the agency retroactivity issue in favor of a position wholly of their own creation. Not surprisingly, Petitioners reject the application of *Beam* and *Harper* to agency decisions to avoid the retroactive application of *Deklewa*. But that does not lead Petitioners to embrace the claim that this Court's decision in *Chenery*, which purports to address the retroactivity of agency decision cases, dictates a contrary result. To embrace *Chenery* would lead to the Third Circuit's "manifest injustice" inquiry. Given Petitioners' campaign of corporate deception in this case, such an inquiry must inevitably lead to the conclusion that *Deklewa* should be retroactively applied here, the conclusion of Judge Becker. So Petitioners reject *Chenery* as well. Instead, it is *Chevron* which controls, claims FWC. (FWC Pet. at 17-20.)

Nor does the Union advocate either of the main alternatives. As noted above, the Union's position was that *Beam* and *Harper* required the retroactive application by the Third Circuit of its own decision in *Iron Workers Local 3* not the Board's decision in *Deklewa*. Since the Union prevailed on Judge Becker's alternative *Chenery* analysis, it has no reason to press its prior position in this Court.

Surely this Court's consideration of whether *Beam* and *Harper* apply to agency determinations or whether *Chenery* leads to a different result must await advocacy which is not driven to reject all of principal alternatives.

III. THE OTHER ISSUES PRESENTED IN THE PETITIONS DO NOT WARRANT REVIEW.

The remaining issues raised in the petitions are nothing more than claims that the Court of Appeals erred in applying routine principles of law to the facts of this case.

Thus, the Petitioners claim that the Third Circuit erred in referring the issues of contract breach and damages to the arbitrator because the arbitrator must conclude that no damages can be shown. (FWEC Pet. at 28-29.) The premise is that the hiring hall operated by Local 70, as to which no complaint or NLRB charge had ever been filed, unlawfully discriminated against members and that the contract excused the employer from using a discriminatory hall. Judge Becker's straightforward treatment of this diversionary issue is more than satisfactory and raises no issue worthy of certiorari. 26 F.3d at 400-01. (App. 66a-69a).[11]

FWEC asserts that it was unfairly surprised by the Court's use of a five-factored test to amplify the *Chenery* standard. (FWEC Pet. at 23.) However, in *Iron Workers, Local 3*, the Third Circuit clearly indicated its belief that "[t]he five factor analysis of *Chenery*" was relevant to consideration of *Deklewa*'s retroactivity. 843 F.2d at 780 n.12. Moreover, the Laborers have consistently argued that actual, detrimental reliance, the most weighty factor, was a crucial factor under *any* retroactivity standard and that Foster Wheeler had not so relied on pre-*Deklewa* law. FWEC knowingly chose to ignore the argument at its peril.

FWEC claims that *McNeff, supra*, limits section 301 jurisdiction to cases involving monetary obligations, not representation. (FWEC Pet. at 23-25.) The Union agrees. We seek backpay and money damages. We do not seek the right to represent the non-union workers on a job now long since completed.

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[11] Even if Foster Wheeler and its subcontractors properly hired employees on their own, this case would still go forward because Petitioners failed to pay their employees the contract wages and make the required fringe benefit payments.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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